VJNH, Inc. d/b/a Vestal Nursing Center and Local 200A, Service Employees International Union, AFL–CIO. Cases 3–CA–21018 and 3–RC–10644

April 28, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On October 9, 1998, Administrative Law Judge Wallace H. Nations issued the attached decision.* The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and an answering brief. The Charging Party filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent VJNH, Inc. d/b/a Vestal Nursing Center, Vestal, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Robert A. Ellison, Esq., for the General Counsel.
Carl A. Schwarz Jr., Esq. and *Matthew J. DeMarco, Esq.,* of Garden City, New York, for the Respondent.
Ruth Heller, Esq. and *Richard A. Maroko, Esq.,* of Syracuse, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Binghamton, New York on June 1–4, 1998. The original charge was filed by Local 200A, Service Employees International Union, AFL–CIO (the Union) on December 11, 1997.[1] The first amended charge was filed January 13, 1998, and the second amended charge was filed February 18, 1998. The complaint issued February 25, 1998.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Charging Party, General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, VJNH, Inc., d/b/a Vestal Nursing Center, a corporation, operates a skilled nursing care center at its facility in Vestal, New York. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it is a health care institution within the meaning of Section 2(14) of the Act. It is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues for Determination

As noted Respondent operates a skilled nursing center in Vestal, New York. This is a nonunion facility in which the Union is seeking to represent a unit of Respondent's employees described as follows:

> All full-time and regular part-time service and maintenance employees, including all certified nursing assistants and floor aides employed at the Employer's Vestal, New York, facility; but excluding the Director of Nursing, Assistant Director of Nursing, case manager, RN Supervisors, head nurses, unit nurses, business office clerical employees, patient care coordinators, clinical coordinators, physical therapists, physical therapist assistants, social workers, music therapists, dietitians, dietary technicians, speech therapists, medical records employees, managerial employees, professional employees, and guards and supervisors as defined in the Act.[2]

The Union filed a Petition for Representation on December 12, 1997, and an election was held on March 26, 1998.[3] Out of the approximately 157 eligible voters, 146 ballots were cast. The vote count was 69 for the Union, 71 against, and 6 challenged. On May 18, 1998, the Regional Director approved a stipulation resolving the eligibility issues raised by the challenged ballots. On May 19, 1998, a revised tally of ballots issued, reflecting that only two of the challenged ballots should be considered. Since they were not determinative, the result of the election was that the Union lost by two votes.

On April 13, 1998, the Union filed some 18 numbered objections to conduct affecting the results of the election. On May 19, 1998, the Union withdrew Objections 4, 6, 8, and 9. On May 18, the Regional Director issued an Order consolidating the unfair labor practice allegations and the objections and directed a single hearing be held in both cases. Objections 1, 3, 5, 7, and 10 are coextensive with certain of the alleged unfair labor practices. Specifically, the complaint alleges that Respondent committed unfair labor practices in violation of the Act by:

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We find it unnecessary to pass on the Union's Objections 2 and 12 in light of our decision to set aside the election based on the other objections sustained by the judge.

[3] In cross-exceptions, the General Counsel has requested a modification of the Board's standard remedial provision requiring a respondent to preserve and make available payroll records for computing backpay. We find that this is not the appropriate case in which to address the requested modification.

[1] All dates are in 1997 unless otherwise indicated.

[2] In this decision, the position of certified nursing aides or assistants will be referred to as CNAs, the position of registered nurse will be referred to as RN, and the position of licensed practical nurse will be referred to as LPN.

[3] The campaign began in late September or early October, and Administrator Johnson learned of its existence immediately.

1. On or about November 29, 1997, and on other dates in December 1997, at the Vestal facility and in a written communication dated December 2, 1997, by its administrator, Denise Johnson, directing employees, under explicit and implicit threat of discipline, to refrain from discussing the Union or engaging in union and/or protected concerted activities while at work.[4]

2. On or about December 9, 1997, in a written communication by Johnson, directing its employees, under explicit and implicit threat of discipline, to inform Respondent of contacts from union supporters and to report the union and/or protected concerted activities of other employees.

3. (a) On or about December 11, 1997, by its supervisor and agent Cheryl Gonzalez, directing its employees, under explicit and implicit threat of discipline, to refrain from using the second-floor pay telephone, thereby eliminating a benefit or privilege previously enjoyed by employees.

(b) On a date in January 1998, removing the second-floor pay telephone, thereby eliminating a benefit or privilege previously enjoyed by employees.[5]

4. (a) On or about December 16, 1997, promulgating a policy prohibiting employees from displaying or wearing union buttons, stickers or insignia.

(b) On or about December 16, 1997, by its supervisor and agent Norma Murphy, directing its employees to remove union insignia from their uniforms.

(c) On or about December 17, 1997, by its supervisor and agent Mary Beth Vasicko, in a telephone conversation, informing an employee that the employee would not be permitted to work unless the employee removed union insignia from her uniform.

(d) On or about December 17, 1997, by its supervisor and agent Mary Beth Vasicko, directing an employee to remove insignia from her uniform.

(e) On or about December 18, 1997, by its Director of Nursing Carol Scurry, directing an employee to remove union insignia from her uniform.

5. On or about December 22, 1997, by its supervisor and agent Judy Randall, prohibiting its employees from attending a union rally.[6]

6. (a) On or about December 22, 1997, granting its employees the benefit of an increased holiday pay bonus, in an effort to thwart the Union's organizational activities.

(b) On a date in January, 1998, increasing the monetary bonus under its attendance policy, in an effort to thwart the Union's organizational activities.[7]

7. (a) On or about December 10, 1997, imposing a 7-day suspension on its employee Kathleen Camp.

(b) On or about December 16, 1997, imposing a 1-day suspension on its employee Rosanna Torres.

(c) On or about December 16, 1997, imposing a 1-day suspension on its employee Yvonne Torres.

(d) On or about December 17, 1997, imposing a 1-day suspension on its employee Vanessa Veit.[8]

[4] This alleged unfair labor practice is coextensive with the Union's Objection 1.

[5] This alleged unfair labor practice is coextensive with the Union's Objection 10.

[6] This alleged unfair labor practice is coextensive with the Union's Objection 5.

[7] The granting of these two benefits is also alleged as objectionable conduct in the Union's Objection 3.

In addition to the Objections which are coextensive with alleged unfair labor practices, the following Objections were considered in the hearing:

> Objection 2 The Employer unlawfully threatened that voting for the union would inevitably result in a loss of flexibility in the workplace.
>
> Objection 11 The Employer unlawfully promised to return within one week of the election in order to "fix all the problems" if employees voted no.
>
> Objection 12 The Employer unlawfully threatened that voting for the union would inevitably result in employees being forced to strike or lose benefits.
>
> Objection 13 The Employer unlawfully created and assisted an antiunion employee organization called "VNC Committee to Stop SEIU" by producing literature, paying employees to engage in antiunion activity, providing phone lists and use of facility copy equipment, telephones, etc. to conduct antiunion activity.
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> Objection 14 The Employer unlawfully utilized a dietary supervisor as the observer for the election.
>
> Objection 15 The Employer unlawfully restricted access to the facility through the use of security and electronic surveillance.
>
> Objection 16 The Employer unlawfully threatened employees that they would not receive a scheduled pay increase as a result of the union organizing campaign.
>
> Objection 17 The Employer unlawfully solicited grievances from employees.
>
> Objection 18 The Employer unlawfully solicited revocations of union representation cards.

B. Facts and Resolution of Each Alleged Unfair Labor Practice and Objection

1. Did Respondent, on or about November 29, 1997, and on other dates in December 1997, at the Vestal facility and in a written communication dated December 2, 1997, by its Administrator Denise Johnson, unlawfully direct employees, under explicit and implicit threat of discipline, to refrain from discussing the Union or engaging in union and/or protected concerted activities while at work?

Vestal's Administrator Denise Johnson held meetings with employees during the latter part of November 1997 to answer employee questions about union activity. According to Johnson, she told employees they had the right to organize. She also told them any organizing should be done in nonpatient care areas and during nonworktime. Prior to this there was no restriction on what employees could talk about while working except for swearing and discussing inappropriate matters.[9]

Employee Kathleen Camp testified that at a group meeting she attended, Johnson told employees that they were not to solicit for the Union during working hours. Camp seemed to amend this testimony on cross-examination when she agreed with Respondent's counsel that Johnson had told the employees that they could not solicit during working time and in working areas.

[8] The unfair labor practices set out immediately above concerning actions taken against Rosanna Torres, Yvonne Torres, and Vanessa Veit are also alleged as objectionable conduct in the Union's Objection 7.

[9] Throughout this decision, when I refer to the "facility" I am referring to Vestal Nursing Center.

In a December 2 letter sent to all employees setting forth Respondent's opposition to the Union, Johnson wrote:

> All of the staff are entitled to their own opinion and should not be afraid to express it openly. However, we must remember that our issues cannot disturb residents. Work time and work location (where residents and visitors are) may not be used to discuss union matters. Each employee has the right to discuss or not discuss these matters. No one has the right to impose himself or herself on another's privacy.

Former Vestal CNA Vanessa Veit[10] testified that Denise Johnson and Director of Nursing Carol Scurry informed employees at meetings held before and after the recognition demand that employees were not allowed to talk about the Union except on breaktime.[11] According to Veit and other employee witnesses, there had been no restriction on what employees could talk about while working, except for swearing and "inappropriate conversations." The only example I can find of what would be an "inappropriate conversation," other than one involving the Union, was noted by Vestal LPN Michele West. She gave a warning to a CNA who in a facility hallway was talking to other employees. The warning relates: "Catherine was in the hallway. She was talking about all the weight she has lost and her pants are loose because she's having sex with Bill who was her boyfriend at the time and she told him to just let's keep on going." West also related that she was informed in an employee meeting with Johnson that employees could discuss union matters only on breaktime and that they could not discuss such matters in resident care areas on the units.

Though, as will be discussed further herein, Respondent for some time had maintained a written no-solicitation/no-distribution rule, it did not have any formal rule restricting topics of conversation among employees. I credit the testimony of Veit and West that Respondent had not placed any restrictions on topics employees could discuss in work areas and on worktime until the Union campaign. I further credit their testimony that Respondent restricted conversations about the union to breaktime and to nonwork areas. Respondent asserts that its purpose in restricting the location and time of talk about the Union is intended to protect residents and visitors from being upset or somehow embroiled in the union organizing activity. Absent any showing that grounds actually exist for such an assumption, I believe that Respondent's restrictions on union related conversations is an unwarranted interference with employees' Section 7 rights and thus violates Section 8(a)(1) of the Act. See *Crestfield Convalescent Home,* 287 NLRB 328, 344–345 (1987); *Industrial Wire Products,* 317 NLRB 190 (1995); *Teksid Aluminum Foundry,* 311 NLRB 711, 713 (1993). In *Teksid,* the Board adopted the holding of the administrative law judge that: "An employer may lawfully forbid employees to talk about a union during periods when they are supposed to be working, if that prohibition also extends to all other subjects not associated or connected with their work tasks. (Citations omitted.) Here, however, the employer through Williams announced a no-talking rule specifically to prevent perceived discussion of unionization and there is no indication that it was concerned about, or thereafter applied the rule to bar, discussion of other nontask-related subjects during working time."

2. Did Respondent, on or about December 9, 1997, in a written communication by Johnson, direct its employees, under explicit and implicit threat of discipline, to inform Respondent of contacts from union supporters and to report the union and/or protected concerted activities of other employees?

On December 8, Union Organizer Andrew Tripp and a group of 10 to 12 facility employees presented Administrator Johnson with a number of authorization cards and a letter demanding recognition of the Union. The demand upset Johnson because she considered the group unruly and loud, and because Tripp and some of the employees with him thereafter went through parts of the facility handing copies of the recognition demand letter to staff and residents. On December 9, Johnson had distributed to all employees a letter which states her views of the incident and in pertinent parts states:[12]

> Numerous employees have reported to me and other supervisors that they are afraid to come to work and are afraid of the Union. We don't know that this fear is justified, but if anyone interrupts you in the performance of your job, and/or harasses you regarding your opinions about this Union—whether at the facility or not—***Please Report Them to me. You do NOT have to submit to ANY harassment, or interruption in the performance of your duties. You also do not have to submit to any activity that could affect your ability to provide for your family. But, if any of you even suspect that the care and/or peace of a resident is in jeopardy YOU MUST IMMEDIATELY REPORT THESE SUSPICIONS TO ME.*** (Emphasis in original letter.)

Other than the demand for recognition, which is discussed in detail in relation to Objection 15, there is no other testimony in the record regarding harassment of employees.[13] I find that this letter could easily cover legitimate union activity as it leaves to the reader to determine any perceived interruption or harassment. The letter in an earlier part states: ***I WILL NOT TOLERATE THREATS AGAINST YOU, OR THE FACILITY, AND I ESPECIALLY WILL NOT TOLERATE THREATS AGAINST THE RESIDENTS.*** (Emphasis in original.) Taken together, I believe the cited portions of the letter both encourages employees to report any perceived harassment and leaves the impression that some reprisal will be taken against an accused. I believe the letter clearly has a chilling effect on legitimate union activity. I find it to be a violation of Section 8(a)(1) of the Act. See, e.g., *Brunswick Electric Corp.,* 308 NLRB 361, 372 (1992) (urging employees to report subjectively perceived union pressures and "harassment" could be interpreted as broad enough to cover lawful activities.); *Mississippi Transport,* 310 NLRB 1339, 1344 (1993) (". . . employer solicitations to employees about reporting union activity if they felt 'harassed' to be unlawful 'because they have the potential dual effect of encouraging employees to identify union supporters based on the employees' subjective view of harassment and discouraging employees from engaging

[10] Veit voluntarily left employment with Vestal in March 1998.

[11] Demand for recognition was made on December 8.

[12] The letter somewhat overstates the seriousness of the incident and has some factual misstatements.

[13] On brief Respondent points to a charge lodged against the Union for allegedly racist behavior. This charge was not discussed in the record or made a part of the record.

in protected activities."'); *Meisner Electric, Inc.,* 316 NLRB 597, 607 (1995) (". . . by requesting employees who were 'harassed' by other employees advocating the Union to report it to management . . . management encourages employees to report solicitations which are subjectively offensive to them and discourage union supporters from engaging in protected activity."); *Arcata Graphics,* 304 NLRB 541 (1991).

3. Did Respondent, on or about December 11, 1997, by its supervisor and agent Cheryl Gonzalez, direct its employees, under explicit and implicit threat of discipline, to refrain from using the second-floor pay telephone, thereby eliminating a benefit or privilege previously enjoyed by employees?

(a) Did on a date in January 1998, Respondent remove the second-floor pay telephone, thereby eliminating a benefit or privilege previously enjoyed by employees?

(b) Discussion of union Objection 15. Did Respondent unlawfully restrict access to the facility through the use of security and electronic surveillance?

The facility has a basement and two floors. The rear entrance to the facility is on the basement level in the rear of the structure. The front entrance at the first-floor level. For some time, the Respondent had a pay telephone located on the second floor near the nurses station in the unit known as skilled care I. There was also a pay phone on the first floor near or in the intermediate care unit. In late December 1997, or early January 1998, the second-floor pay phone was removed and placed near a security guard's desk at the rear entrance of the building. When the security guard was moved to the front entrance and a video camera and intercom were installed at the rear entrance, this phone was moved to a location near the basement breakroom. The second-floor pay phone was replaced by a phone that was exclusively for the use of residents. The phone in the intermediate care area was moved to the front entrance at about the same time.

CNA Vanessa Veit testified that while the phone was on the second floor, employees could use it for incoming and outgoing phone calls, so long as the use of the phone by an employee did not become excessive. It was Veit's understanding that the purpose of the phone was to allow employees to make and receive calls as they were not allowed to use facility phones or resident's phones.[14] Further, if residents did not have personal phones, they too could use the pay phone. Employees were not to use the facility's phones except to receive emergency incoming calls. Employees from other units also came to the second floor to use the pay phone.

Sometime after the demand for recognition had been made and before the second-floor pay phone was moved, Veit attended an employee meeting conducted by supervisor, Cheryl Gonzalez. According to Veit, Gonzalez announced that employees were not to receive personal calls on the unit, except on break or meal time. No reason was given. CNA Lisa Roberts testified that Gonzalez told her and four or five other employees that she did not want any more personal calls on the pay phone. Cheryl Gonzalez testified that she did not restrict use of the pay phone except to remind employees that they were not to make or receive calls while working. However, based on her own description of what she told employees, it would be easy to interpret it as a prohibition against employees using the pay phone. In response to a question asking whether she restricted employee use of the pay phone, Gonzalez answered "Only during working hours, when they were on duty and supposed to be tending to residents, em, they were reminded not to make personal phone calls or accept personal phone calls. "I credit the employee witnesses regarding what they were told by Gonzalez. Gonzalez also testified that the pay phone had been a problem for the 5 years she had been a head nurse. [15]

Denise Johnson testified that employees were "re-reminded" of the Respondent's rule about phone usage in December 1997. This rule, which appears in Respondent's employee handbook, reads: "Personal calls are not to be made or received on duty except in an emergency. Phones at the nurses stations are not to be used at any time for personal calls. Pay phones are available for calls during break or meal times or as authorized by your supervisor."

According to Vanessa Veit, this rule was not enforced until after the meeting conducted by Gonzalez. Lisa Roberts testified similarly, noting that the pay phones could be used by employees at any time so long as the employees did not abuse the privilege. Roberts noted that she received occasional personal calls from her husband as she has four children and with her 12-hour shift, there are times when he needs to check with her. Moving the phone from the second floor was inconvenient because now the only way to reach her is by a facility phone at the nurses desk which is against rules.

Denise Johnson testified about the reason the pay phones were moved. First she suggested it was in response to some unspecified employee request and then she testified: "After we finished the full security system that involved the intercom and a buzzer, and after that was in, it was prohibited to use the phone and have to be buzzed back in every single time to go out because it's considered a secure area out there, so because of all that, we moved the pay phones down to the locker area." I have to admit I do not understand the second reason at all. The intercom system was put in some time after the phone was initially moved.

I find that the credible evidence reveals that Respondent prior to the demand for recognition did allow employees to place and take calls at the second-floor pay phone. Thus to the extent that Gonzalez announced they either could not do that any more or restricted it only to breaktimes is a change in practice. The Respondent's rule does not appear to have been enforced. Though Gonzalez testified that it had been a problem for 5 years, it was not until the Union demanded recognition that Respondent's management took any action with respect to the pay phone. I believe that it was part and parcel of Respondent's response to that action, which also included the placement of security guards at the front and back entrances, and the sudden enforcement of existing rules regarding access to the facility by off-duty employees. As I believe each of these actions, removal of the pay phones, tightening access to the facility and the placement of security guards are tied together, I will discuss these other two acts at this point in the decision. They are raised as objectionable conduct in the Union's Objection 15.

The Union's Objection 15 asserts that Respondent unlawfully restricted access to the facility through the use of security

[14] Employees could receive emergency calls on facility phones.

[15] Lisa Roberts gave the only estimation of the frequency with which the pay phone was used, estimating it was one or two times a shift.

and electronic surveillance. I believe that Respondent's resort to security and limited access had its genesis in the Union's demand for recognition.

On or about December 8, 1997, the Union prepared a letter addressed to Denise Johnson in which it demanded recognition. The letter was signed by the employee organizing committee and it included the signatures of a number of employees. It was hand delivered to Johnson by about 10 to 12 employees and the Union's chief organizer, Andrew Tripp. These persons gathered at the back of the facility and each person took a number of union flyers. The group then went through the facility's back door and took the elevator to the first floor and went into Johnson's office.[16] According Vanessa Veit, they met with Johnson and demanded recognition. She refused to grant it. Johnson asked the group to leave and they did leave her office.

Denise Johnson had a different version of what occurred. She testified that when the group of employees arrived at her office, Tripp led them in. She asked him to leave and he refused. According to Johnson the employees threw authorization cards on her desk, threw demand letters on her desk and threw stickers on her desk. They yelled and screamed at her, demanding she recognize the Union. She told them that on advice of counsel, she would not look at the cards or grant recognition. She gave them the phone number of Respondent's counsel and suggested they call. Johnson decided she would be unable to have a calm meeting with the employees so she started to leave the office. Tripp blocked her way at the door and she had to squeeze by him.

After Johnson left her office, the employees had a short meeting in the office and then went through the building handing out the demand for recognition letter to employees and speaking with residents. Tripp himself spoke with several residents and gave them a copy of the letter. Nurse Supervisor Mary Vasicko testified that on December 12, while on duty, she observed several people leave Johnson's office. Shortly thereafter, she was told the people she saw were passing out flyers. She went to check and found Tripp passing out flyers. She told him he had no right to be there and ordered him to leave. She escorted him out of the building.

Tripp went to his car in the facility's back parking lot and spoke to a couple of employees who had been with the group making the recognition request. At this point the local police arrived and asked why he was still present on the property. Tripp said he was leaving. The police asked Johnson if she wanted him arrested. She said yes and they arrested him.

On the following day, Johnson prepared and had distributed to employees in the facility a letter concerning the demand. In part it states:

> I'm sure you all noticed or heard about yesterday's commotion at the facility. An intruder was unlawfully on the premises confronting many of you, and many of the Residents. The intruder said he was from the Union and said he had a right to be here. He did not have any right to be at the facility. Although I personally asked the intruder to leave the premises, instead of honoring my request, he became belligerent to me and the office staff. I had to call the Vestal Police Department and have him removed from the premises. The Union organizer upset many of our Residents by distributing this threatening letter to them while he was trespassing in the Resident care areas. I can't believe that any of you would condone such behavior, and I've been told that many of you—even Union supporters—were upset that the Union organizer did this without your consent. Is this the man that you want to bind you to a contract?

In late December 1997, Respondent prepared and distributed to employees a flyer which accuses the Union of a variety of unsavory activity at the facility including vandalism, harassment, making false statements to the public, making racist threats, purposely breaking rules, and disrupting patient care. It also announces the hiring of trained security guards.

A guard was placed at the front and rear entrances to the building. At the rear entrance, where employees entered the facility, a security door was installed that operated electronically. Employees were given electronic badges which opened the outer door. They then dealt with a guard who checked to see if they were on the day's schedule. If they were, he marked off their names on the schedule and let them pass. If their name was not on the schedule, the guard called a supervisor to see if the employee could come in. If the supervisor did not approve entry, the employee would have to leave.[17] With the addition of the guards also came a change in practice regarding admission to the facility of off-duty employees.

Respondent at all times material had in effect a written rule covering access to the facility by off-duty employees. It reads: "An employee is not to enter the Facility or remain on the premises unless he or she is on duty or scheduled to work. The only exception will be if an employee has Facility business to transact or is picking up his or her paycheck." Respondent maintained another rule on this subject, which reads: "Entertaining, visitors, friends or members of family of employee while on duty" could "justify dismissal or other discipline."

According to Veit, this limited access rule was never enforced until the onset of the union campaign. Lisa Roberts testified that before the campaign, she would visit the home with her children on holidays to take gifts to residents. After the campaign began, this ceased. An employee could only enter the building during off-duty hours to pick up a paycheck. There was no showing that the other rule was ever enforced and the testimony of LPN Michele West would indicate strongly that it was not.

LPN West testified that before the campaign she entered the facility when off duty to speak with her fiancée, who also is employed by Respondent. After the campaign started, she went to the facility to speak with him and was told by a supervisor to leave, even though she had a valid reason to be there. West was not disciplined for the attempted visit. West also testified that in the past, some family members were violently loud when visiting residents and one tried to kill her mother; yet no security was installed until the union campaign. In this regard, Vestal employee Kim Geertgens testified that some kids had come into the facility on several occasions to use a vending machine in the breakroom. She also noted that she had had her lunch stolen

[16] Going into the facility through the back required the group to go up the stairs to the first floor and then some distance to the office. Had they gone in through the front, they could have reached the office without going through any resident areas.

[17] The addition of the security guards occurred at the end of December 1997, or in early January 1998. Later, near the election, the security guard at the rear was removed and a video camera and intercom system was installed. This allowed the guard at the front desk to cover both entrances, seeing and speaking to persons seeking entry through the rear entrance by means of the camera and intercom.

on one occasion and other employees had their lunches and some money stolen on occasion. Yet no security was placed in the building though these incidents were reported to management.

Denise Johnson alluded to the demand for recognition and the actions of Tripp during the demand as a reason for installing the security system. No one from management credibly countered the evidence presented by employees that the facility's practice regarding access to the facility by off-duty employees changed with the onset of the campaign. Respondent presented another reason for security, though curiously Johnson, the facility's administrator, did not testify that this reason played any part in the decision to put in security. Vestal recreation department employee Susan Painter testified that in December 1997 a resident expressed concern that a man and woman she did not know had approached her and wanted to take her picture. The pair explained they were doing a followup to an earlier program. Though the two showed no identification and the resident felt uncomfortable, she allowed her picture to be taken. After the picture was taken, she asked where they were from and they would not tell her. The two were not signed in and met with no member of staff. She testified that this incident caused concern with the residents and management. I question whether Painter's alleged reason was even considered as management had not put in a security system for the thefts, visitors who behaved violently and following the attempted murder of a resident, all undenied events.

I firmly believe that all three events, the restriction on the use of and removal of the pay phones, the sudden enforcement of limited access rules, and the installation of security guards were all in response to the Union's campaign and the demand for recognition. Of the three acts, only the addition of the security guards appears to me to have any reasonable basis not totally tainted by animus. It does appear to me to be a rather massive response to the visit of Tripp, though his actions on December 8 strike me as extremely counterproductive and immature. However, as this is a facility populated by relatively captive patients, I will not second-guess management's perceived need for security. Of the three acts in question, at least this one has some degree of benefit for them. The other two acts however, I find are aimed entirely at either punishing the employees for the union activity at the facility or a heavyhanded attempt to stifle such activity.

First, with respect to the matter of the telephone, No legitimate reason was offered for the clear change in practice with respect to its use announced by Supervisor Gonzalez. Given Gonzalez' testimony that the phone had been a problem for years, the timing of this change, coming shortly after the demand for recognition strongly suggests it was motivated out of animus to either punish employees, show them the error of their ways in supporting the Union, or as an attempt to gain surveillance of the use of the phone. Though the phone was in plain sight and perhaps hearing of the nurses station on the second floor, the nurses are not always there. By moving it to within a few feet of the guard in the basement, Respondent was assured that a nonneutral party could overhear all conversations on the phone. Respondent points out that a more private phone was placed in the entrance vestibule and from the standpoint of being overheard, its point is valid. However, one must pass by a security guard to use this phone, so usage is still under the guard's surveillance. The movement of the basement phone to the basement staff lounge after the basement guard was removed also points to an unlawful motivation in moving the phone. If Respondent had no such motivation, why didn't it move the phone to the lounge in the first instance. I find that the abandonment of a longstanding practice of allowing fairly unfettered use of the second floor phone by employees and the sudden enforcement of a rule restricting that use, and the removal of the phone to guard station in the facility's basement were acts taken in retaliation for the employees' Union activities. As such, it violates Section 8(a)(1) of the Act. See *Stoughton Trailers, Inc.,* 234 NLRB 1203, 1206–1207 (1978); *Melody Oldsmobile–GMC, Inc.,* 230 NLRB 440, 447 (1977); *D.V. Copying & Printing, Inc.,* 240 NLRB 1276 (1979); *Westpoint Transport, Inc.,* 222 NLRB 345, 352–353 (1976); *G.F. Business Equipment, Inc.,* 252 NLRB 866, 869–870 (1980); *Elizabeth Motors, Inc.,* 252 NLRB 1148, 1152–1153 (1980).

With respect to the Respondent's no-access rule, though its existence may be valid, may be nonetheless unlawful if it was either promulgated or enforced only after the advent of a union organizing campaign. *Nashville Plastic Products,* 313 NLRB 462 (1993). Accordingly, if an employer maintained an otherwise valid no-access rule prior to the advent of the organizing campaign, but did not enforce it until after the campaign began, the employer will have violated Section 8(a)(1) of the Act. *Hickory Creek Nursing Home,* 295 NLRB 1144, 1149 (1989). In the instant case, the credible evidence shows that prior to the union campaign, the no-access rule was not enforced and employees could visit residents or friends. No problems were shown to have resulted from allowing such visits. It was not until the Union attempted to organize Respondent's employees that enforcement of the rule became progressively more stringent. Specifically, soon after the Union campaign had begun, Respondent first posted security guards at employee entrances to ensure that off-duty employees were denied access. As I have previously found that posting of the guards satisfies any legitimate interests that the facility has in affording protection to residents, this enforcement of the no-access rule to off-duty employees and the timing of the enforcement leads me to find that it was enforced to punish employees for union activity and in an attempt to restrict or chill such activity. It is therefore unlawful and the Union's Objection to such conduct is well taken and the objection is sustained.

4. Did Respondent, on or about December 22, 1997, by its supervisor and agent Judy Randall, prohibit employees from attending a union rally?

On December 22, 1997, the Union held a press conference in front of the facility. It was covered by a local TV station and a number of dignitaries were present. CNA Vanessa Veit was involved in organizing the conference.[18] It was held during her lunchbreak, so she went to the conference. She had been there about 5 minutes when she was paged back into the facility. When she returned there appeared to be no reason for the page. She asked her supervisors why she was paged and they did not know. They did tell her that Wendy Harris, who works in administration, had phoned for her and had asked if she was at lunch and if Veit had signed out. While she was at the conference, she saw several antiunion employees in attendance including Catherine Whipple, Shannon Watts, and Todd Weidman.

[18] Veit had participated in the demand for recognition and was a known union supporter.

LPN Catherine Gonzales testified that during her 12-hour shift, she is allowed 2 half-hour breaks and 2 or 3 10-minute breaks. Her head nurse and supervisor was Judy Randall. During the day of December 22, Gonzales and CNAs Joanne Labbe and Todd Weidman were talking at about the time the press conference was being held. They asked Randall if they could take their break and were told, "Not at this time, because of the stuff going of outside." However, Weidman, who opposed the union was allowed to leave whereas Labbe, who supported the Union was not.

CNA Todd Weidman testified that he attended part of the conference as it occurred near his breaktime. According to Weidman, there is an understanding of when breaks are to be taken and that he did not ask anyone when it came time to take his break.

Supervisor Judy Randall testified that she remembered the press conference, but does not remember anyone in particular asking to go out. She testified that the employees had their assigned breaktimes and if it fell during the conference they could have gone to it. She testified that breaks are assigned by the employees' daily assignment. She had four CNAs on the unit. One came at 5:30 a.m., two more at 6:30 a.m. and one at 9 a.m. The 5:30 person would get breaks at 8:15 to 8:30 for a meal, a 15-minute break later, another meal break in the afternoon followed by a later 15-minute break. The breaks were staggered by the starting time of CNAs. There is no policy stating that breaks cannot be taken with permission at other than the usual times. Randall testified that during the conference a number of employees from other wings came through hers on their way to the conference.

CNA Lisa Roberts was on the Union's employee organizing committee and participated in the demand for recognition. She is a known union supporter. She worked the day of December 22, but because she had coverage in the afternoon, she was able to leave and attend the press conference in its entirety. She testified that about 20 employees attended the conference which lasted about a half-hour to 45 minutes. These employees were from most departments, including the office. She testified that a few of the employees present were for the Union, but most in attendance were against it. Antiunion employees present included Todd Weidman (in uniform) and Catherine Whipple (out of uniform). After the conference, Roberts' supervisor, Mary Miller, told her that Wendy Harris had called the unit to ask where Roberts was. Miller told her that Harris had called to make sure that she and Veit did not leave the unit. No reason was given.

I do not find the evidence with respect to Gonzalez to be conclusive. Breaks in her department appear to be relatively fixed and as Weidman's break was scheduled, there appears to be a valid reason for having other CNAs stay in place until their breaks are scheduled to provide adequate coverage. On the other hand, the action which Respondent took against Veit and attempted to take with respect to her and Roberts is both undenied and is clearly designed to interfere with their Section 7 rights. By paging Veit back into the building and by the act of Harris attempting to keep them in the building during the conference, without legitimate reason, Respondent violated Section 8(a)(1) of the Act.

5. Did Respondent, on or about December 22, 1997, grant its employees the benefit of an increased holiday pay bonus, in an effort to thwart the Union's organizational activities?

(a) Did Respondent, on a date in January 1998, increase the monetary bonus under its attendance policy, in an effort to thwart the Union's organizational activities?

Vanessa Veit testified that in the 3-1/2 years she worked for Respondent, it was customary for employees to receive a Christmas bonus of $25 for full-time employees and $15 for part-time employees. In 1997, the Respondent, without explanation, upped the Christmas bonus to $50. Administrator Johnson agreed that for many years, a $25 bonus had been given employees and that in 1997, the bonus was increased to $50.

During 1997 the facility was inspected by the State of New York (JHACO survey) and no deficiencies were found. The facility also had no deficiencies upon inspection by the State Department of Health. When the employees were told of the favorable inspections at a time well before Christmas, there was no mention that it might result in increased bonuses. Johnson contended that the increased bonus was a thank you to employees for the deficiency free inspections. The results of the inspections were known by management in July. However, until this hearing, no announcement was made to employees that the bonus increase had anything to do with the inspections. In July 1997, management was considering giving gift certificates to employees as a thank you; but, again, no employee was told of this. When the bonuses were handed out, no announcement was made tying the increase bonus to the successful inspections.[19]

The Respondent also has a practice of awarding bonuses on an annual basis to employees with perfect attendance records for the year. These awards are given in a ceremony that usually takes place between Christmas and New Year's day. Until 1997, the amount of this award was $25. In 1997, this award was increased to $100. Johnson testified that the facility has had an increasing problem with absenteeism and was trying to do something positive to make good attendance more attractive to employees. As with the Christmas bonus, nothing was said to employees in advance about the increase and no reason for the increase was communicated to employees.

The evidence establishes that Respondent departed from its established practice by increasing the Christmas bonus from $25 to $50 and the attendance bonus from $25 to $100. Apart from the timing of the increases, it is significant that the reasons given by Respondent were not communicated to employees. In this regard, I believe the asserted reasons are not the real reasons for the increases. Concerning the Christmas bonus, the State Health Department and JHACO surveys were completed in January and July. In addition, Respondent's July proposal for staff appreciation gifts (cash bonuses "like we do at Christmas time" or selective gifts), while approved, was not implemented at the time. Although the favorable results of the surveys were communicated to the employees, they were not told that they would receive any reward.

Similarly, with regard to the attendance bonus, in addition to the timing of its issuance, Johnson's inability to recall when she made the determination to quadruple the amount is subject to question. Also subject to question is Respondent's asserted

[19] Johnson testified that a few employees asked why the bonus was increased and she told them it was in response to the inspections. None of the employees testified herein.

decision to not communicate the decision to employees prior to giving the bonuses. This secrecy defeats the asserted reason for increasing the bonus, to wit, encouraging employees to improve attendance. If they do not know that the reward for improving attendance has been increased, no incentive exists to improve attendance.

In *Dlubak Corp.,* 307 NLRB 1138, 1160–1162 (1992), it was noted that the grant of benefits during an election campaign is not per se unlawful where an employer can show that its actions were governed by factors other than the election. Among the factors the Board considers are whether the employer had previously informed the employees of the change and whether the change was consistent with past practice. In *Dlubak,* as in the instant case, there was no evidence to corroborate the employer's claim that the benefit had actually been decided upon prior to the election campaign or that it had been previously announced. In addition, the amount of the bonus was significantly greater than amounts paid in the past. Accordingly, "[w]hether intended by the Respondent or not, by virtue of the timing of the substantial, previously unannounced bonus, the employees could hardly miss the message that the source of their benefits was the company, not the Union." Id, at 1162.

6. Did Respondent, on or about December 10, 1997, unlawfully impose a 7-day suspension on its employee Kathleen Camp?

(a) The circumstances surrounding Camp's suspension

Kathleen Camp was employed by Vestal as a CNA from November 1996 until March 1998. She worked on a night shift from 6:30 p.m. to 6:30 a.m. Camp was a union supporter who spoke about the Union with other employees and passed out union literature. She was suspended for a week in December 1997. The suspension arose from an incident which occurred on December 9. I would note that this was day following the demand for recognition. According to Camp, she reported to work that day a few minutes early. She clocked in at the timeclock in the facility's basement and went quickly to the first floor. Once there she began handing out union literature to employees she encountered, saying, "This is our side." She testified that everyone she gave literature took it willingly and that none of her activity was witnessed by any resident of the facility. She came across a registered nurse, Pam Wike, who was in the corridor outside the dementia unit, preparing a med cart.[20] Camp testified that she placed the literature on the cart, saying "This is our side. Can't leave you out." According to Camp, the employee glanced at the document and continued passing medications. Camp then went to work.

Later that evening, according to Camp, Wike questioned her about the literature that Camp had passed out earlier and about the Union. According to Camp, she asked if Camp wasn't supposed to pass out literature during break and not interfere with patient care. According to Camp, she also asked why Camp supported the Union and what good the Union would do for employees. Camp answered and the conversation lasted about 7 or 8 minutes. Finally Camp broke off the conversation saying that she was not supposed to talk about the Union on her worktime. Camp then went for a meal break.

RN Pam Wike testified that at about 6:30 p.m., Camp passed her with a green piece of paper, which she placed on Wike's medication cart. Camp was coming on duty at the time and in Wike's view, had begun working. Wike was dispensing medication to a resident at the time. After she had finished dispensing medications, she looked at the paper and found that it had to do with the Union. Wike went to Camp and told her that she did not know her, but that she was an RN and that she could not talk about the Union. According to Wike, Camp said she did not want Wike to think she was harassing her, and Wike assured her she was not. They then engaged in what Wike termed small talk. Wike brought the matter to the attention of management the next day and was asked to write a statement of what happened.

The following day, Camp was telephoned at home by Director of Nursing Scurry, who asked her to report to work early. When she went to the facility she was called into a meeting with Denise Johnson and her supervisor, Norma Murphy. Johnson began the meeting by stating that Camp had violated Vestal's policies the previous night by handing out union literature. She gave Camp an "Employee Warning Record" dated December 10. It states under Company Remarks:

> The staff generally and each employee has been advised and warned on numerous time[s] in writing that our Employee Rules and Regulations prohibit solicitation in working areas and during working time.[21]
>
> It has been brought to my attention that you have violated this rule by soliciting and handing out non-work related documents in a work area and during working time. This conduct is unacceptable." Camp was suspended for a week.[22]

(b) The evidence adduced relating to Respondent's disciplinary system

Camp told Johnson that she did not understand why she was being suspended without being first given a verbal warning and/or a written warning before a suspension. Camp understood this to be Respondent's practice with respect to discipline. On this point, CNA Vanessa Veit testified that her understanding of Respondent's disciplinary policy was that it was progressive, going from a verbal warning, to a verbal written warning, then a written warning, then after the third warning, termination. This disciplinary procedure had been explained to her by a supervisor during her orientation at Vestal. LPN Michele West was told by her supervisor when it became necessary for her to discipline an employee that the disciplinary policy was as follows: first give a verbal counseling, then give a written warning, then disciplinary action is taken on the next offense to include possible suspension or termination.

Denise Johnson testified that on December 9, it was brought to her attention that Camp had solicited a head nurse at the nurses' station while the nurse was on duty. Johnson was not sure that she ever saw the flyer that Camp was distributing. Johnson testified that under Vestal's disciplinary policy, the

[20] Wike was new at the facility at the time and Camp did not know her.

[21] Respondent maintains a no-solicitation/no-distribution rule reading:

Solicitation or handbilling by any person who is not an employee is prohibited on premises. Employees may not engage in solicitation of any kind during their working time. Employees may not engage in distribution of any material in any working area, either before, during or after working time. Employees are prohibited from engaging in solicitation and distribution of any kind during working and non-working time in immediate Resident care areas.

[22] Johnson testified that though the suspension covers a 7-calendar-day period, it was only for 3 working days because of Camp's schedule.

level of discipline depends on the perceived severity of the violation of rules. For a minor infraction, an employee is counseled by a supervisor. If the matter is more serious or is a repeated offense, the employee is given a written verbal counseling report. If the matter is a severe violation, the employee is given a written warning. Employees generally are given two written warnings before termination is considered. The Respondent has no policy regarding suspension, though they are occasionally given for absenteeism and for allegations of patient abuse. In the case of absenteeism, employees were first given verbal and written warnings. Employees under suspicion of patient mishandling or abuse are automatically suspended pending investigation.

Johnson testified that she considered Camp and all other employees to have been given a first warning about solicitation. This "warning" was her admonition to employees in meetings held in November 1997, that they could not solicit in patient care areas on worktime. No notation that this amounted to a counseling appears in any employee's personnel file. She also pointed to a December 2, 1997 letter, she sent to employees where she stated, inter alia: "All of the staff are entitled to their own opinion and should not be afraid to express it openly. However, we must remember that our issues cannot disturb our residents. Worktime and work location (where residents and visitors are) may not be used to discuss union matters." Johnson believed that at the time Camp was suspended, that the facility was out of control, that employees were not obeying the solicitation rules, that there was harassment of employees occurring, and that the atmosphere was one of fear and intimidation. She had sent out a letter on December 9, which I have heretofore found to be unlawful in paragraph 1 above, saying much the same thing. Johnson admitted that one of the reasons for suspending Camp was to send a message to employees that management was serious about being in control. In my opinion this message that serious consequences can flow from engaging in union activities was a followup to the message contained in the letter of the same date.

(c) Evidence adduced about solicitation allowed by Respondent

Substantial evidence was put in the record that solicitation for purposes other than union ones were routinely allowed in work areas on worktime prior to the onset of the campaign and even after it started.

Camp testified that Respondent allowed solicitation at work for nonunion related activities. She remembers employees selling Tupperware, Home Interior products,[23] Popular Club products, and Friendly Home products at the facility. She noted that orders for some of these catalog sales items were taken in the facility's office. She also remembered that on the same day on which she distributed literature and was suspended for it, some items ordered by an employee were being delivered in the kitchen area of the floor she worked on. She recalled seeing sales catalogs at nurses stations. The Respondent had not acted to prevent these activities prior to the union campaign and employees had discussed and handed out order form books during worktime and in work areas. Camp testified that after her suspension, she brought in a Popular Club catalog and discussed it with a supervisor on worktime in a work area without discipline. Nurse Supervisor Gail Ohmer testified that in December 1997 she observed Camp on her work unit showing other employees a catalog and soliciting purchases. Ohmer pointed out to Camp she was not allowed to solicit on the units. Ohmer took her catalog and threw it away. This occurred after Camp's suspension and Ohmer felt Camp was setting her up. Ohmer did not discipline Camp for this activity. Ohmer has a policy of discarding any catalogs she finds in work areas.[24] Camp also testified that an employee brought in an order book in late January 1998, and employees from almost all units looked through it and placed orders.

Vanessa Veit testified that employees have sold Avon products and Girl Scout cookies at the facility. She testified that sales of these products took place in work areas. With the sale of catalog items, normally the catalogs would be left at nurses stations or in the breakrooms. With Girl Scout cookie sales, the employees would be approached by the employee selling the cookies. Veit herself bought Girl Scout cookies and took delivery of them on her work unit. She testified that prior to the union campaign there was no restriction on this activity. After the campaign got underway things changed. Respondent began making all sales take place in breakrooms and on breaktime.

LPN Michele West testified that she sold Mary Kay products at work. The Assistant Director of Nurses sold Christmas wreaths and Girl Scout cookies at work on a number of occasions. These sales took place during worktime in work areas.

Lisa Roberts testified that she sold Home Interior products through a catalog. Even after the campaign began she took the catalogs to work and showed them to Vestal's employees, including members of management. She also bought Girl Scout cookies in work areas before the campaign began.

The evidence also reflects that Respondent had taped to nurses desks on the units, in view of employees and residents, antiunion material prepared by it, thereby negating its argument that its solicitation rules were designed to protect residents from the Union "issues."[25]

(d) Conclusions with regard to Camp's suspension

The record demonstrates that Respondent discriminatorily suspended Camp for placing prounion literature on Wike's cart. It is clear that Respondent has consistently allowed, and its own supervisors had engaged in, a wide range of nonunion related solicitations in working and patient care areas, including solicitations for such products as Tupperware, Home Interiors, Friendly Homes, Popular Club, Avon, Girl Scout cookies, Mary Kay, Dick's Club, and Christmas wreaths, both prior to and subsequent to December 9. Thus it is clear to me that Respondent did not have an enforced policy with respect to solicitation in work areas on worktime unrelated to the union campaign or union literature. Its arguments that union literature is different from product sales is seriously undercut by evidence it not only allowed, but participated in taping such literature to nurses desks on the resident units, where such literature is in plain sight of residents. Further, as more fully discussed with respect to Union's Objection 13, it gave aid to antiunion activities of employee Catherine Whipple, including copying and encouraging the distribution of antiunion literature prepared by Whipple.

[23] The evidence reflects that some sales of Home Interior products are done by the residents themselves as part of a recreation program for them. Other sales of these products, however, are by employees for their own gain.

[24] Ohmer admittedly "didn't make a big issue out of the catalogs" and made no attempt to find out who left the catalogs in the units.

[25] Vanessa Veit had observed antiunion literature taped to nurses stations. This particular material was prepared by management.

It also distributed Whipple's literature to all head nurses as well as other members of supervision.

Apart from the disparate enforcement of its no-solicitation rule as to prounion materials, it is clear that the level of discipline meted out to Camp was disproportionate to the level of the alleged offense. Respondent acknowledges, and the record indicates, that it did not make a big issue over other incidents of solicitation that were brought to its attention. Respondent failed to apply its own progressive disciplinary policy to Camp. Under this policy or practice, employees were generally given verbal counselings, verbal warnings, and up to three written warnings before serious discipline such as suspension or termination resulted. It is clear that Camp received no prior discipline. Johnson's contention that her informing employees in meetings of Respondent's no solicitation policy and a similar message in her letter of December 2, constitutes a verbal warning under the disciplinary policy is ludicrous and obviously contrived for this proceeding. Yet, even if one gave credence to Johnson's contentions in this regard, the issuance of a 7-day suspension would have still been inconsistent with Respondent's disciplinary policy or practice.

Respondent's discriminatory motive against Camp is further supported by the fact that there is no evidence that her conduct in any manner interfered with residents. She asserted that no residents observed her activity on the evening she gave Wike the flyer. Wike contended she was in the presence of a resident when Camp came by. However, even crediting Wike, she testified that Camp merely placed the flyer upside down on the med cart without saying anything. Thus a resident, even an alert one, would not have any idea of what happened. Even Wike did not know what Camp had placed on her cart until she finished her rounds and took time to look at the flyer. Camp was not given the opportunity to respond to Johnson's allegations against her in the meeting in which she was suspended. On the other hand, Wike was asked to give written documentation of her side of the story. Most significant however, is Johnson's acknowledgement that the motivation behind Camp's suspension was "sending a message to let everyone know we were serious about being in control." I find that Respondent has admitted to singling out Camp for harsher treatment because her alleged violation of the facility's solicitation policy involved union activity. Giving such discriminatorily motivated discipline to Camp violates Section 8(a)(1) and (3) of the Act. See, e.g., *Lucille Salter Packard Children's Hospital,* 318 NLRB 433 (1995) (employer regularly permitted nonemployee commercial organizations to solicit and distribute materials); *Opryland Hotel,* 323 NLRB 723, 728–729 (1997) (presumptively valid no-solicitation rule must be applied uniformly, not sporadically, not springing up only when union activities began, and not singling out union activities only for enforcement); *K & M Electronics, Inc.,* 283 NLRB 279 (1987) (selective enforcement of no-solicitation rules against employees engaging in union activity while permitting employee commercial distribution soliciting/distribution activity). Under a *Wright Line*[26] analysis, it is clear that Respondent violated the Act. General Counsel has demonstrated animus, union activity on the part of Camp and Respondent's knowledge of that activity. By its disparate treatment of union versus other forms of solicitation, its far harsher treatment of Camp vis-a-vis anyone else violating the no-solicitation rule for non-union purposes, its abandonment of its disciplinary policy and practice in Camps case, and by its own admission that by disciplining Camp that it was sending a message to employees, Respondent has demonstrated that union animus was the motivating factor in Camp's discipline. It has made no case whatsoever that it would have given Camp a suspension for any reason not motivated by animus.

7. Did Respondent, in mid-December, 1997, unlawfully promulgate and enforce by threats and discipline, a policy prohibiting employees from displaying or wearing union buttons, stickers, or insignia?

CNA Vanessa Veit worked on December 17, 1997, wearing a smock provided by Vestal and a pair of white pants she provided. On her smock, she had placed a sticker which read: "Dare to struggle, Dare to win." The sticker was about 4 inches long and 2 inches high, about the size of her name tag. According to Veit, during her work shift, Supervisors Mary Beth Vasicko and Cheryl Gonzalez took her into Gonzalez's office and asked her to remove the sticker.[27] They asserted that the stickers were upsetting the residents. Veit refused to remove it, saying that she had a right to wear it and it was not interfering with her work. The two supervisors said, "fine' and left. Later during her shift, Veit was again approached by Vasicko who again asked Veit to remove the sticker. Veit again refused and she was then threatened that if she did not remove the sticker, they would remove her from the facility. She refused and Respondent had her escorted out of the facility about 5 hours before her shift ended. She was not paid for this time. During the day, Veit had observed other employees with stickers on their smocks and pants. Some of the residents asked for stickers and wore them.

Vasicko testified that on December 17, 1997, she was making rounds and observed three employees with stickers on their uniforms. The employees were Vanessa Veit, Sheila Warmuth, and Lisa Roberts. She asked them to remove the stickers. She told them that she did not think it fair for the residents to be drawn into an issue that they had nothing to do with. She again asked them to remove the stickers. Though the employees may have been wearing more than one sticker, she only observed one on each employee, in the area of the uniform where they wore their name tags. Vasicko then left the area and returned in about 15 minutes to see if the employees had removed the tags. They had not. Sheila Warmuth asked if she could wear the sticker on her shirt, under her uniform smock. Vasicko said she could not as it might fall off when she leaned over a resident. Warmuth removed her sticker. She told the employees they could wear the stickers anywhere but patient care areas. After some more urging, Lisa Roberts removed her sticker. Veit, however, insisted she had a legal right to wear the sticker and refused to remove it. Vasicko said that she and the facility felt differently and gave Veit the option of removing the sticker or going home. Veit went home.

Lisa Roberts testified that she wore a "Dare to Struggle, Dare to Win" sticker to work. She wore it once before the election, and then for a few days surrounding the election. On the first occasion she wore it, she was told by Supervisor Mary Beth Vasicko to remove it and Roberts refused. Vasicko said she had

[26] *Wright Line*, 251 NLRB 1083 (1980).

[27] It is unclear to me whether Veit was wearing more than one sticker. It does not matter however as Supervisor Vasicko testified that she only observed Veit wearing one sticker, on the chest area of her smock. Veit testified that the Union also provided stickers that said, "Support Kathy," "Vote Yes," "Recognize us, 200 'A,' Yes."

to remove the sticker because of the residents. Vasicko then threatened that she would be sent home if she did not remove the sticker. Roberts removed it. The offending sticker was affixed to her work smock. She has worn without comment stickers showing bears on her uniform on previous occasions.

The day after she was sent home, Veit reported to work, but was refused entrance by a security guard who told her she was not on the day's schedule. The guard called a supervisor who said that Veit had been removed from the schedule and she would have to leave. Veit left and later that day found a message on her answering machine from Vestal. Vasicko had called and said that a mistake had been made and to give her a call. However, by the time Veit got the message, her shift was already over. She was not paid for this day either. She reported to work on her next scheduled day and was allowed to work, sans the sticker.

Vasicko's testimony about the following day is consistent with Veit to a point. She testified that after reaching Veit's answering machine, she actually talked with Veit around 10 a.m., about 4 or 5 hours into Veit's 12-hour shift. Veit told her in this conversation that it was too late to come in.[28] Though Vasicko testified that it was for the residents' sake she wanted the stickers removed, there is no evidence that the stickers upset residents in any way.

LPN Michele Ann West testified that on December 16, 1997, she wore "Support Kathy" and "Dare to Struggle, Dare to Win" stickers on her clothing at work. CNA Rose Torrez also wore both stickers. Her sister, CNA Yvonne Torrez wore the "Dare to Struggle, Dare to Win" sticker as did CNAs John Reese, Julia Riviera, and Theresa Miller. Prior to this date, no one from management had said anything about the wearing of stickers. During West's shift, she was approached by Yvonne Torrez who told her that Supervisor Norma Murphy was sending her home for refusing to remove her sticker. West told Torrez they did not have to remove the stickers. At this point Supervisor Murphy asked if West was wearing a sticker and West showed her the ones she was wearing. Employees Reese and Rose Torrez were also present. West told the group they did not have to remove the stickers, pointing out that the employees were wearing them on personal clothing and not on the facility supplied smocks. Murphy told the group to remove the stickers or go home. West argued that she had been allowed to wear a Mary K T-shirt and an Ocean City T-shirt. At about this time, Reese and Miller removed their stickers. Rose Torrez and West continued to refuse and they were sent home. The following day West called to see if she was to work and was told that she could come in, if she wore no stickers.[29]

Nurse Supervisor Norma Murphy testified on December 16, she observed Michele West and the Torrez sisters wearing stickers. According to Murphy, they each had two stickers on their smocks and two on their pants. She asked them to remove the stickers and they refused. She ordered them to leave the facility. She did not issued formal discipline over the incident.

Nothing in the Respondent's rules expressly prohibits the wearing of stickers, rather Respondent's dress code merely requires that employees dress "appropriately." Indeed, Veit testified that employees at Vestal routinely wear nonuniform items on their clothing while they work. These include angel pins, breast cancer pins, Christmas stickers, Halloween stickers, childrens' pictures, school emblems, and other pins. Other employees have worn a variety of shirts that had messages or pictures on them. This has been allowed by Vestal. Veit herself wore an American flag sticker without comment. Supervisor Gail Ohmer testified that during a hot air balloon festival held annually in the area, the nursing home has a mini festival as Ohmer is a balloon enthusiast. During this mini festival, employees wear balloon T-shirts or sweatshirts instead of their regular uniforms.

I believe the evidence establishes that Respondent unlawfully suspended employees Veit and the Torrez sisters for wearing the Union-related stickers and unlawfully made removal of the stickers a condition to continued employment. In this regard there is no rule prohibiting the wearing of such items. In fact, it appears that employees have routinely worn, without limitation, items such as American flags, school emblems, angel pins, Christmas and Halloween ornaments, and apparel pertaining to commercial (Mary Kay) and charitable (breast cancer awareness) causes. In addition, Respondent's contention that wearing of the union insignia was upsetting to the residents has not been established. In this regard, it is again significant that Respondent has not prohibited the placement of antiunion materials at the nursing station, to which residents have access, and evidently permitted residents to attend and observe the December 22, union press conference from outside the facility.[30]

In *St. Luke's Hospital,* 314 NLRB 434 (1994), the Board found that employees were unlawfully prohibited from wearing insignia that stated, "United to Fight for our Health Plan." There, the Board noted that the wearing of the insignia constitute protected activity, the wearing of which cannot be prohibited unless the employer establishes "special circumstances" to justify the restriction. The Board found the record devoid of evidence that patients might be upset by the insignia. Finally, it was noted that the insignia were not vulgar, obscene, or disparaging. In *Holladay Park Hospital,* 262 NLRB 278, 279 (1982), the Board reasserted the proposition that "special circumstances" justifying the prohibition against wearing union insignia were necessary where the employer has discriminatorily enforced its dress code to allow employees to wear other types of insignia. See also *Shelby Memorial Home,* 305 NLRB 910, 919 (1991) (selective and disparate enforcement of uniform rule where employees were allowed to wear pins and other paraphernalia, and the "vote yes" patches were not shown to be provocative or offensive); *St. Vincent's Hospital,* 265 NLRB 38, 42 (1982) (formal disciplinary action is not a prerequisite to finding an overly broad rule has been unlawfully enforced).

I find that Respondent has failed to show "special circumstances" where it has allowed employees to wear other types of insignia and has not established that the union insignia had caused, or would reasonably cause, an adverse effect on the residents' health and welfare. Nothing about the insignia involved herein is offensive, provocative, obscene, or disparaging. I find that the Respondent's actions in requiring the removal of the insignia and its discipline to Veit, Yvonne, and

[28] This small disparity in the testimony of the two witnesses does not bear on the question of whether an unfair labor practice has been committed. It would bear only on the matter of backpay. I will defer to the backpay proceeding to decide whether Veit should be paid for the entire day or only a portion of it, when this matter can be more fully developed.

[29] Though West and other LPNs were subsequently determined to be supervisors, at this time she was part of the bargaining unit which the Union sought to represent.

[30] See testimony of Todd Weidman, Tr. 545, LL. 24 and 25.

Rosanna Torrez for refusing to remove their insignia violates Section 8(a)(1) and (3) of the Act. Respondent's promulgation of this rule and making it a condition of continued employment that employees not wear such insignia also violates the Act.

8. Discussion of the Union's Objection 2. Did Respondent unlawfully threaten that voting for the Union would inevitably result in a loss of flexibility in the workplace?

In a letter from Denise Johnson to employees dated March 11, 1998, she wrote:

> You see, the point behind unions is that, although they say that they will equalize the workplace, what that really means is that you will no longer have the option to individually work out issues that affect you personally, like needing flexibility in the worktimes so you can take care of your family.

Threats to impose more onerous working conditions should employees choose to be represented by a union are violative of the Act. *Allegheny Ludlum Corp.,* 320 NLRB 484 (1995). This rule has been found to prohibit statements suggesting that, if the union were to succeed, the employees would suffer a loss of flexibility in work schedules. In *Allegheny Ludlum,* a supervisor explained to a unit employee that, under a union contract, employees would lose the "flexibility" currently afforded by the Employers policy of allowing employees to "set up doctor's appointments during worktime [and] to take half-day or 1-day vacations at a time. Id. at 488. The administrative law judge held that the threat to discontinue the existing informal policy of flexibility constituted an unlawful threat to impose more onerous working conditions. The Board expressly adopted the administrative law judge's findings in this regard, concluding that "the threatened loss of flexibility was unlawful." Id at 484. I find the Union's Objection 2 to be meritorious.

9. Discussion of the Union's Objections 11 and 17. Did Respondent unlawfully solicit grievances from employees and did it promise to return within 1 week of the election to "fix all the problems?

All the evidence relating to these two Objections arose out of a series of meetings conducted with employees by Vestal's owner, Tony Salerno. In each of these meeting, Salerno introduced himself and gave a brief history of his involvement in the nursing home business. There is no question in my mind that at these meeting, regardless of the language remembered by witnesses, Salerno asked to hear employee problems or issues and did so. He thereafter, depending upon whose testimony one believes, either promised to fix them if the employees voted no in the election or promised to solve or fix these problems regardless of the outcome of the election.

CNA Kim Geertgens testified that at meeting of employees, Salerno listened as the employees told them of their problems and why they wanted a union. The employees mentioned that the length of the shifts made it difficult to find babysitters. They complained of a lack of communication with management. According to Geertgens, Salerno replied to these complaints by saying, "[If] you vote no he would come back the following Friday after the election and help fix all our problems."

Unit Secretary Wanda Griffis testified that she attended a meeting conducted by Salerno. According to Griffis, Salerno talked about the Union, about his history with nursing homes, and that a union he had been a member of was not the greatest. She did not recall him saying that if employees voted no, he would come back and fix their problems. On the other hand, the meeting Griffis attended does not appear to be the one Geertgens attended.

Vestal's Rehab secretary, Jo-Ann Barnhart, testified that she attended a meeting where Salerno spoke. She testified that he opened the meeting and gave the employees some personal history. He then said he wanted to know and to discuss staff hours and other problems at the nursing center at the time. She testified that he just wanted an open forum and wanted some feedback as to what employees felt were problem. She did not remember him saying he would come back to the facility and solve the problems if the employees voted no. She testified that Kim Geertgens was at the meeting she attended. Barnhart did remember Salerno saying that whatever the outcome of the election, the employees' problems had to be solved or needed to be fixed.

CNA Gloria Gilbride testified that she attended a meeting with Salerno, evidently the one Geertgens attended. She remembers Salerno saying he realized that there were a lot of problems and he would be taking care of them eventually. She did not hear him say that if the employees voted no, he would come back and fix the problems. She said that most of the meeting, employees just gave him their complaints.

Rehab nurse Jean Leonard testified that she attended a meeting with Salerno and did not remember him saying that if the employees voted no, he would come back and fix the problems.

Rehab aide Genie Wilson testified that Salerno talked with the employees about the problems everyone thought were happening. He wanted to know how the employees felt and wanted them to let out what they were feeling.

Employee Janet Whitmore attended a Salerno meeting. She testified that the meeting was to let Salerno introduce himself to employees whom had not met him and to let him hear any agendas that they might have in the upcoming election. She testified that he did not say that if the employees voted against the Union, he would come back and fix the problems. She remembered employees sharing their problems with him. Speaking about these problems, she recalled that he said that there were things that needed to be fixed and that regardless of the outcome of the election, they would have to be fixed.

Several of the witnesses called herein attended the same meeting as Geertgens and did not recall Salerno saying that if the employees voted against the union, he would come back the week after the election and fix their problems. As they appeared as credible as Geertgens and as employees in such meetings often come away thinking they heard something they did not, I will not credit the exact language Geertgens quoted. On the other hand, it is clear from the preponderance of this evidence, that Salerno solicited employee grievances and problems, and promised to solve them, thereby negating any need for a union. It has long been recognized that the bestowal of benefits during an organizational campaign can be as coercive as a threat. It follows that, in addition to the actual grant of benefits, the promise of improved benefits in order to discourage employees from selecting the union is equally violative of the Act. *Medical Center of Ocean County,* 315 NLRB 1150, 1153 (1994). There need not be an express promise to take corrective action on the basis of information obtained nor an explicit link between the solicitation and unionization. Instead, where the solicitation of grievances was not made in accordance with a well-established and consistent employer policy of doing so, there is a compelling inference that [the employer] is implicitly promising to

correct those inequities he discovers as a result of his inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary. *Kmart Corp.,* 316 NLRB 1175, 1177 (1995), quoting *Reliance Electric Co.,* 191 NLRB 44, 46 (1971); see also *House of Raeford Farms,* 308 NLRB 568, 569 (1992)

An employer may rebut this inference by showing that it maintained a regular practice of soliciting employee grievances established prior to the onset of the union's organizational campaign. However, a showing that only one verified employee meeting was held and "possibly several others at most", is insufficient to establish such a regular practice. *House of Raeford Farms,* supra at 569. Furthermore, even if the employer can show that it had a regular practice of holding employee meetings, the employer must also show that grievances were customarily solicited during those meetings. *Kmart Corp.,* supra at 1177. The employer may also present evidence that directly rebuts the inference that it promised to remedy those grievances it solicited, e.g. explicit caveat that it was making no promises following the solicitation. *Uarco, Inc.,* 216 NLRB 1, 2 (1974).

As applied to the instant case, this precedent compels a finding that Salerno's speeches during the captive audience meetings were objectionable. During these meetings, Salerno openly solicited employee complaints, and openly promised to solve them. This type of solicitation of grievances during employee meetings conducted by the owner himself, were unprecedented. The evidence shows that Salerno attended only one meeting previously. The purpose of that single meeting was merely to introduce himself to new employees, not to provide a forum to air employee complaints. This does not constitute a regular practice, much less a regular practice of soliciting employee complaints.

Salerno not only did not fail to add a caveat that he could make no promises, but to the contrary, expressly promised to remedy grievances. I find that the Union's Objection 17 is meritorious and find that Objection 11 lacks merit, because of my credibility finding above.

10. Discussion of union Objection 12. Did Respondent unlawfully threaten that voting for the Union would inevitably result in employees being forced to strike or lose benefits?

Vanessa Veit testified that she attended meetings where Denise Johnson indicated to employees that strikes are inevitable. Veit challenged this assertion, saying to Johnson that employees decided whether or not they wanted to strike. Johnson countered saying that the Union made this decision. Veit replied that it took a vote of 60 or 75 percent of the employees to authorize a strike. Veit testified that she attended four such employee meetings and Johnson talked about strikes at three of them. According to Veit, all of these meetings took place before a demand for recognition was made.

Lisa Roberts attended a meeting with employees and Denise Johnson. She remembers Johnson telling the employees that in negotiations, if the union did not agree with the employer's proposed contract, it could strike until it got a contract it liked.

About a month before the election, Respondent prepared and distributed to employees a flyer which states, inter alia: "If the management cannot meet the SEIU'[s] demands in negotiation there is no agency or person who can force a settlement—that's the law. The SEIU will make you strike and risk your jobs—that's the facts."

In another letter to employees from Denise Johnson, dated March 11, 1998, she wrote:

> The only thing any union can do is ask management for what it wants and strike if it doesn't get it." Later in the letter, she added: "Another thing this Union can just about guarantee is that they will force you to strike if their demands are not met. That is the SEIU track record—making demands that cannot be met, then forcing members to strike and those wages and benefits that no future increase could ever make up for.

CNA Lorraine McLean testified that she attended a meeting conducted by Denise Johnson. According to McLean, Johnson told the employees present that "the Union couldn't guarantee [employees] anything. That the only alternative that the union has when management and the union sit down is to strike." This meeting occurred near the end of the organizing campaign. In this meeting McLean pointed out that there were alternatives including arbitration and mediation.

Susan Painter testified that at one of the employee meetings, Denise Johnson said that "strikes are possible."

CN Cheryl Hopkins testified that she attended two group meetings conducted by Johnson. Hopkins recalls Johnson saying the employees could be forced to go on strike by the Union.

Based on the evidence submitted, I find that Respondent, through Johnson in employee meetings and letters to employees, did threaten clearly that voting for the Union would inevitably result in employees being forced to strike or lose benefits. It is clear that predicting the inevitability of strikes is unlawful. The rationale underlying this rule is that such statements carry with them the inference that "no matter how negotiations progressed and no matter what the Union sought from [the employer] the employees would nevertheless have to strike to obtain a contract." *Heartland of Lansing Nursing Home,* 307 NLRB 152, 158 (1992), quoting *Devon Gables Lodge & Apartments,* 237 NLRB 775, 776 (1978); see also *Pyramid Management Group, Inc.,* 318 NLRB 607, 608 (1995). In essence the employer is threatening that, if the employees choose to be represented by a union, it will refuse to bargain in good faith, thereby creating the impression that the employer's own intransigence would render unionization futile. Id. In the absence of affirmative assurances that the employer will bargain in good faith, warnings that strikes are inevitable are considered to be anticipatory refusals to bargain in good faith and, therefore, violate the Act. 1998 NLRB LEXIS 50, #13 (1998).

A similar rationale has been applied to statements that the only recourse available to a union in order to gain concessions is the strike. As the Board stated in *Fred Wilkinson Associates,* 297 NLRB 737, 737 (1990), quoting *Amerace Corp.,* 217 NLRB 850, 852 (1975):

> In arguing against unionism, an employer is free to discuss rationally the potency of strikes as a weapon and the effectiveness of the union seeking to represent his employees. It is, however, a different matter when the employer leads the employees to believe that they must strike in order to get concessions. A major presupposition of the concept of collective bargaining is that minds can be changed by discussion, and that skilled, rational, cogent argument can produce change without the necessity for striking. . . . Employees should not be lead to believe, before voting that their choice is simply between no union and striking.

Accordingly, the Board in *Fred Wilkinson Associates* held that the statement: "the only thing [the Union] can guarantee is a strike. In fact the only thing the [Union] can do is to get the

company to agree to its demands is to call a strike," contained in a memorandum to employees was, standing alone, sufficient to set aside the election. Id.

The unlawful effect of such statements are exacerbated when joined with a statement explaining that the employer cannot be legally compelled to concede to any demands made by the Union. *Seville Flexpack Corp.,* 288 NLRB 518, 534 (1988) ("the union can make all the demands it wants, BUT WE DO NOT HAVE TO AGREE TO A THING. The fact of the matter is that when the company makes a final offer, the union has, in reality, two choices. It can accept the offer or strike" was an unlawful act of futility). Under this standard each of the aforementioned statements were objectionable. Johnson's direct admonition that "strikes are inevitable" is the paradigmatic threat and, as such, is unlawful. *Healthcare and Retirement Corp. of America,* supra (threat that "if the Union in a strike was 'inevitable'" violated Sec. 8(a)(1)). The only slightly more subtle statements contained in her March 11, 1998 memorandum, that "the only thing any union can do is ask management for what it wants and strike if it doesn't get it" and her verbal admonition that the Union could not guarantee anything and that "the only alternative that the Union has when management and the Union sits down is strike" are equally unlawful declarations under *Fred Wilkinson Associates,* supra. Finally, in her written warning that "there is no agency or person who can force a settlement—that's the law. The SEIU will make you strike and risk your jobs—that's the Facts" is clearly similar to the statements found unlawful in *Seville Flexpack,* supra. I find the Union's Objection 12 meritorious.

11. Discussion of union Objections 13 and 18. Did Respondent unlawfully create and assist an antiunion employee organization called "VNC Committee to Stop SEIU" by producing literature, paying employees to engage in antiunion activity, providing phone lists and use of facility copy equipment, telephones, etc. to conduct antiunion, and did Respondent unlawfully solicit revocations of union representation cards.

Union Objections 13 and 18 will be discussed together as they both relate to alleged unlawful activity on the part of Respondent in its interaction with employees opposing the Union.

(a) Catherine Whipple related activities

Objection 13 primarily deals with the activity of CNA Catherine Whipple, who opposed the union organizing campaign actively throughout and Respondent's actions in support of her efforts.[31] Whipple wrote two open letters opposing the Union. She also spoke to employees about her feelings when asked. When she drafted her first letter, she spoke to Denise Johnson about it. She asked about distributing it and Johnson told her there was to be no solicitation on the units or any place where residents can observe the solicitation. She was directed to use the staff lounge or the smoking area outside. About a week later, Johnson told Whipple that copies of the letter had been made. Whipple asked if Johnson wanted them passed out and Johnson said she did. Whipple then placed copies of her letter on the table in the staff lounge and posted one near the timeclock. Johnson also told her that she had given copies of the letter to head nurses and told them they were available in the lounge.

Subsequently Whipple wrote another letter which she gave to Johnson. This letter was not distributed. Whipple wanted to send it to the NLRB and needed to get the Board's address from Johnson.

Whipple created the "VNC Committee to Stop SEIU" as a joke. Other than herself, the committee had no members. She typed her letters on her father's computer and copied much of her material on his printer or at a drug store. She prepared at least two and perhaps three antiunion flyers which she distributed at the facility.

One of the leaflets she prepared includes cartoon drawings of "Union Boss Blake" and "Union Boss Alcoff." However, when asked, "Who is Union Boss Blake,?" Whipple responded, "It's a name I heard. I'm not quite sure. I know Alcoff. I didn't know Blake." She did not know where she had heard the name mentioned, did not know who the person was, and did not know what the person's first name is. The name Blake was not included on any of the literature produced by the Union or the Employer as introduced at the hearing.

Sara Moyer worked at Vestal in January and February 1998. During her employment she received a phone call at home from Catherine Whipple. Moyer's telephone number is unlisted, though it was in the possession of Respondent. Moyer testified that "she (Whipple) said she called pertaining to the union. Well, I didn't want to verify anything that I thought pertaining to the union one way or the other because I wanted just to go and work but she stated who she was which I never even heard of." Whipple testified that she found a SEIU employee telephone list in the breakroom and took it. It had about 12 names on it. She called each person and told them she had found a phone list of the SEIU with their name and number on it. She told them she was getting rid of the list as soon as she notified each person named. Given the vague testimony of Moyer about what Whipple said and the absence of other testimony that Whipple engaged in calling employees about the Union, I have no basis for not crediting Whipple's explanation and I do so credit it.

On the day of the union press conference December 22, Whipple was not on duty and attended the conference. Before it began, she entered the facility, though off duty and spent about half an hour visiting residents. No one in management asked her to leave the facility pursuant to Vestal's no-access rule discussed earlier.

On the day of the election, CNA Lorraine McLean observed Whipple walking around the facility carrying a "Vote No" sign. She was on facility property. Whipple was in uniform. Whipple was allowed to enter the facility several times during the day for water or whatever. She had worked the night shift before the election. She denied she was in uniform, but she was wearing white pants. She did not deny she entered the facility nor is there any evidence she was asked to leave even though she was not on duty. She admitted that she did not punch out until 7:30 a.m. Yet, sometime between 5:30 and 5:45 a.m., she went out into the employee parking lot and moved her car which was filled with "Vote No" signs to the front parking lot.

This occurred even though Johnson stated at the preelection conference that no employee would be permitted to stay on the premises after voting; the guards would let them in the front door and they would be expected to vote and leave. Thus, if Whipple was entering and leaving the building throughout the

[31] One element of this objection is the Union's contention that Respondent's attorney either prepared, had prepared, or supplied information to Whipple so she could prepare, a sophomoric flyer attacking Union Organizer Andrew Tripp. I believe the evidence, or generally the lack thereof, on this issue makes it too speculative to form the basis for any meaningful findings. Accordingly, no findings will be made.

day, the guards were letting her into the building even though she was not on the schedule and was not there to vote. Similarly, Whipple was permitted to pass out antiunion buttons all day.

Several employees offered hearsay evidence that Whipple passed out antiunion literature in work areas on worktime. No one testified that they actually saw this happen. Some witnesses, including Whipple herself, testified she posted antiunion literature near the facility's timeclock. But this was a location where prounion literature was also posted. One witness, Vestal CNA Kim Geertgens, testified that Whipple talked to her about the Union while she was working, even following her into a resident's room to continue the conversation. There was no showing, however, that any one in supervision observed this act of solicitation in a working area on working time.

I consider the matter of Respondent's assistance to Whipple to not be so significant that it would affect the election. Most of its assistance was minor or speculative. With respect to Whipple's letter, Respondent gave her several copies, but did not let her distribute them anywhere but the lounge or outside the facility. Perhaps, and I mean perhaps, it supplied her with the information necessary to prepare the flyer mentioning "Union boss Blake." But that is by no means certain, and again seems a relatively minor bit of assistance. Respondent does seem to have allowed Whipple a level of freedom of access to the facility it denied other employees. For example, she was able to access the building when off duty, when other employees were turned away. She was able to picket all day on election day, contrary to the directions of the administrator. Though her activities on this day were in plain sight, Johnson did not stop or punish this activity. I find the Respondent's assistance to Whipple to be de minimis and find the Union's Objection 13 not to have merit.

(b) Respondent's efforts to have employees revoke authorization cards

The Respondent solicited revocations of authorization cards through letters to employees, provided forms, addressed and mailed forms to the employee's homes, and addressed, stamped and mailed completed forms to the Union on the employees' behalf.

In a letter sent to employees by Vestal on December 2, 1997, employees are informed, inter alia:

> You can revoke a card that you have signed by sending the union a note saying: "I hereby revoke any authorization card given to Local 200 SEIU." Date it and sign it and mail it to the union. Be sure to make a copy for yourself. You also have the right to demand to have the card returned to you.

In a letter sent to employees on December 12, 1997, Denise Johnson first notes some articles in the New York City newspapers that were adverse to the Union, notes Andrew Tripp's arrest and then states:

> I am sure that the SEIU organizers withhold this information about their Union when they try to push people into signing membership cards. If you signed a card without knowing all the facts and wish to revoke it, you can. You can send the enclosed card revocation to the Union, today. Be sure to keep a copy, because they may say they never got it.

Enclosed with this letter was a form employees could use to revoke their authorization cards.

Similarly, in the last paragraph of a flyer prepared by Respondent entitled, "What is happening at your nursing home?" Johnson wrote:

> If you signed a card—you can revoke it. Talk to your coworkers. Ask them why this Union has to lie, threaten and coerce you, and tell them you will not support anyone who engages in these kinds of activities.

Vestal CNA Kim Geertgens testified after being told by coworker Catherine Whipple that there had been a union-related near riot at the nursing home, Geertgens sought out Denise Johnson to see about revoking her authorization card. Johnson gave a form to accomplish this. Johnson said that a lot of employees were revoking their cards and asked if she could use Geertgens' name and Geertgens said she could. Johnson told her that employees Mary Cole and Whipple were opposing the union. Johnson gave Geertgens some extra revocation forms to take with her. Geertgens filled out the form in Johnson's office and did not remember leaving with it or mailing it. The revocation form filled out by Geertgens was mailed to the Union in an envelope provided by Respondent and postage was paid by Respondent. Johnson denies supplying the envelopes and postage and her counsel tried to suggest that employees could have taken envelopes and used the facility's postage meter to put postage on.

Johnson's denial of providing assistance with respect to the mailing of the revocation forms is not credible, given the quantity of envelopes that contain the Vestal postage meter number and the similarity of the handwriting on each of those envelopes. See Charging Party Exhibits 15 through 20. Moreover, Johnson admitted giving revocation forms to employees Charles Partridge and Shannon Watts in her office, and both of these forms arrived at the Union in similar envelopes with Vestal's postage meter number on them. Johnson could not recall if she met with employees Amy Benjamin or Mindi McRorie;[32] however, their revocation forms arrived in Vestal postage-metered envelopes with the same handwriting for the return address.

From the credible evidence I find that Respondent did address, pay for the mailing and mailed employee's revocation forms to the Union.

As a general rule, an employer may not solicit employees to revoke their authorization cards. *Uniontown Hospital Assn.,* 277 NLRB 1289, 1307 (1985). An employer may, however, advise employees that they may revoke their authorization cards, so long as the employer neither offers assistance in doing so or seeks to monitor whether employees do so nor otherwise creates an atmosphere wherein employees would tend to feel peril in refraining from revoking. *R. L. White Co., Inc.,* 262 NLRB 575, 576 (1982). Thus, an employer may not offer assistance to employees in revoking authorization cards in the context of other contemporaneous ULPs. *Escada (USA), Inc.,* 304 NLRB 845, 849 (1991) (distributing a sample revocation letter to employees in the context of other unfair labor practices unlawful).[33]

[32] This person's name is spelled in a number of ways in the record. I have adopted the spelling taken from C.P. Exh. 13, a form signed by the person.

[33] See also *Chelsea Homes,* 298 NLRB 813, 834 (1990) ("By now providing a sample form and preaddressed envelope to assist employees avoid the serious consequences of union authorization and membership, in the context of the unlawful campaign it was waging . . . [the

In the instant case, Respondent provided employees with unsolicited information regarding how to revoke their union cards and sample revocation forms. It provided envelopes, postage, and on several occasions, actually mailed the letters for the employees. Under these circumstances, Respondent's assistance in revocation was neither passive nor ministerial. *Lockwoven Co.,* 245 NLRB 1362, 1371 (1979) (providing paper, pens, envelopes and postage, as well as mailing the first batch of revocation forms, was "hardly passive" assistance). Furthermore, this was done in the midst of an antiunion campaign marked by the commission of unfair labor practices by Respondent. In this context, Respondent's assistance cannot be said to have occurred in an atmosphere free of coercion. Therefore, Respondent's conduct amounted to an unlawful solicitation of revocation. That the efforts of Respondent only resulted in about 10 or 11 withdrawals, of which it assisted in mailing about half, does not diminish the unlawfulness of its efforts in this respect. I find union Objection 18 meritorious.

12. Discussion of union Objection 14. Did Respondent unlawfully utilize a dietary supervisor as the observer for the election?

At the preelection conference, Tammy Huling, the Respondent's observer at the election was not on the *Excelsior* list and the Union's observer, CNA Cheryl Hopkins, told Union Organizer Andrew Tripp that she was a supervisor. Tripp asked Huling if she was a supervisor and she replied not usually. Tripp followed up on this question and Huling said she was a supervisor on some weekends. Though the direction of election specified that nonsupervisory persons were to be observers, it was too close to the election to do anything about it. Tripp protested to the NLRB officer in charge. Hopkins testified that she based her opinion on the fact that Huling always wore a white coat and was always with the head of the dietary department. The evidence reflects that professional employees, technical employees, and supervisors wear white coats.

Vestal's director of human resources, Brenda Hathaway, testified that Huling is a dietary technician. Her job description has no supervisory duties and her place on the home's organizational chart shows no one reporting to her.

Denise Johnson introduced payroll documents for the months of February and March 1998 that reflect that Huling was not paid for any supervisory duties during those months. Huling had served as a supervisor in the past as she worked her way up in the dietary department. She had been a dietary aid, a prep cook, a cook, and a cook supervisor. She is now considered a clinician. The last time Huling had been a supervisor was over 2 years before. Huling reports to the food service director and shares an office with this person. No one reports to Huling. Based on Johnson's testimony, Huling's job appears to be to ensure that resident's dietary needs are met. To that end she goes throughout the facility checking their medical needs and seeing if the diet they are getting is correct, safe for them, and what they want. She reports back her findings to the food service director.

Huling's employee performance appraisal for the diet technician includes a review of the job skills of "informs Food Service Director of any problems with nursing staff or any department" and "occasionally supervises dining rooms during lunch and dinner meals." Johnson credibly testified that the only problems she reports back are those dealing specifically with dietary needs of the residents. Huling was not shown to have ever performed any supervision in the dining rooms in her current job, the performance appraisal form notwithstanding.

The Union concedes that Huling is not a statutory supervisor, but contends that she is a person bargaining unit employees would perceive as one closely identified with management. The Board has held that an employer may not select a statutory supervisor or other individual who is "closely identified with management" as its election supervisor. *BCW, Inc.,* 304 NLRB 780, 780–781 (1991). Several factors cited by the Union as bearing on the decision of whether a person is "closely identified with management" are: whether the individual was considered management by other employees; the location of the individual's office and its proximity to management personnel; whether the individual reported directly to management; whether the person acted as a conduit of information to management; whether the individual ever assumed supervisory functions or responsibilities, albeit only as a substitute for an absent supervisor; and whether the employer expressed the limitations on the individual's authority to the employees; the manner in which the employee is listed in the employee manual; whether the individual performs the same functions as unit members; and whether the individual wears attire or insignia which are identified with supervisory or managerial attire.

Applying these factors rationally to the limited evidence of record, I find that Huling was not a person closely identified with management. The only person testifying that he or she considered Huling was part of supervision was Cheryl Hopkins, who based this believe on the color of the uniform worn by Huling. Employees other than managerial or supervisory wear the same white uniform worn by Huling, including technical and professional employees. Huling did share an office with the director of food services, but I'm not sure how this would lead people to believe she was a supervisor. CNAs share desks with registered nurses and LPNs, who are supervisors. Huling did report directly to one management person, the food service director. But what she reported was clinical or technical in nature and had nothing to do with supervision of employees or with employees per se. Huling was not shown to have performed any supervisory duties within any time relevant to this proceeding, and was shown to have performed bargaining unit work during that timeframe.

In all, given the unrebutted description of her job, a CNA should know that she is the person who checks on the dietary needs of the residents and tries to make sure their diets are correct for them. No CNA or other bargaining unit employee testified that they considered Huling a supervisor or person closely identified with management nor offered any evidence which would support such a finding. I do not find that the Union's Objection 14 has merit.

13. Discussion of union Objection 16. Did Respondent unlawfully threaten employees that they would not receive a scheduled pay increase as a result of the union organizing campaign.

Vestal has had a practice since 1994 to give across-the-board raises to employees. While there may have been some periods of time between raises that exceeded 12 months, all employees received across-the-board raises in April 1997 and during 1996. The group has always been treated equally; if CNAs did not

employer] exceeded the permissible bounds of providing ministerial or passive aid in withdrawing from union membership and actively solicited, encouraged and assisted such withdrawals in violation of its duty to avoid such interference with employee rights under Sec. 8(a)(1) of the Act").

receive a raise in a given time period, no one else did. As of January 1998, Denise Johnson was talking with the facility's owners regarding plans for 1998, and she hoped that anniversary raises would be given for the fiscal year of April 1998, through March 1999.

On March 13, 1998, Denise Johnson issued a "confidential" memo to all nonunit employees. It read:

> I am pleased to announce that again this year there will be across the board increases on April 1st for all management and supervisory staff and for all members of the staff who are not included in the Service and Maintenance bargaining unit. As you are aware VNC is not permitted by law to make any promises of wage increases or benefits to any members of staff who might be affected by same, prior to the SEIU Union election for the Service and Maintenance Staff on March 26th. And VNC is not permitted to give or announce any increases for Service and Maintenance Bargaining Unit Staff. You are not to comment on this matter.

Lisa Roberts saw this memo lying on top of the nurses' station on her wing. She was doing paperwork at the station when she saw and read it. She had never before seen a memo marked "confidential." Roberts testified that raises were not given every year. CNA Lorraine McLean also saw the document lying on a nurse's desk when she went to the desk to get some paperwork she needed.

I do not find that the memo in question was intended for dissemination to affected employees and do not question that it was intended to be confidential. That some employees saw it because of careless handling of the memo by a nurse does not make the document something that Respondent intended to get into the hands of bargaining unit employees. There is no evidence about what happened after the document was discovered by unit employees. I do not know if it was brought to the attention of management so management could respond. I do not know if it was kept a secret until the election to be used as a possible objection. Under these circumstances, I do not find that union Objection 16 has merit.

C. Should the Election Be Set Aside?

In addition to the normal Board remedies for unfair labor practices, the Union urges that the election be set aside and a new election be held. I agree with this position. The test for setting aside an election is whether, under all the circumstances, an employer has engaged in conduct which could have the reasonable effect of destroying the "laboratory conditions" necessary to ensure that employees have the opportunity to make an "uninhibited" choice of a bargaining representative. *General Shoe Corp.,* 77 NLRB 124, 127 (1948). Under this standard, conduct may be objectionable even if it is insufficiently severe to rise to the level of an unfair labor practice. Id. at 126, 127. Accordingly, because objectionable conduct is analyzed under a more lenient standard than are unfair labor practices, it follows that a violation of Section 8(a)(1) is "a fortiori, conduct which interferes with the results of an election." *Airstream, Inc.,* 304 NLRB 151, 152 (1991).

A finding that an employer has engaged in objectionable conduct warrants setting aside the election as tainted, "unless it is so de minimis that it is 'virtually impossible to conclude that [the violation] could have affected the results of the election.'" Id. (citations and internal quotations omitted). In making the de minimis determination, it is proper to consider "the number of incidents, their severity, the extent of dissemination, the size of the unit, and other relevant factors." Id.; see also *Waste Automation & Waste Management of Pennsylvania,* 314 NLRB 376, 376 (1993). It is worth emphasizing that the test for setting aside an election is an objective one, which considers only the conduct's reasonable "tendency" to interfere with the employees freedom of choice and to which the subjective reaction of the employees is "irrelevant." *Hopkins Nursing Care Center,* 309 NLRB 958, 958 (1992).

Looking first at the unfair labor practices,[34] I have found that Respondent violated Section 8(a)(1) by:

1. On or about November 29, 1997, and on other dates in December, 1997, at the Vestal facility and in a written communication dated December 2, 1997, by its Administrator Denise Johnson, directing employees, under explicit and implicit threat of discipline, to refrain from discussing the Union or engaging in Union and/or protected concerted activities while at work.

2. On or about December 9, 1997, in a written communication by Johnson, directing its employees, under explicit and implicit threat of discipline, to inform Respondent of contacts from Union supporters and to report the union and/or protected concerted activities of other employees.

3. (a) On or about December 11, 1997, by its supervisor and agent Cheryl Gonzalez, directing its employees, under explicit and implicit threat of discipline, to refrain from using the second-floor pay telephone, thereby eliminating a benefit or privilege previously enjoyed by employees.

(b) On a date in January 1998, removing the second-floor pay telephone, thereby eliminating a benefit or privilege previously enjoyed by employees.

4. On or about December 16, 17, and 18, 1997, promulgating a policy prohibiting employees from displaying or wearing union buttons, stickers or insignia, directing its employees to remove union insignia from their uniforms, and in a telephone conversation, informing an employee that the employee would not be permitted to work unless the employee removed union insignia from her uniform.

5. On or about December 22, 1997, interfering with its employee's Section 7 rights by calling them back from and attempting to prohibit their attendance at a union rally.

6. (a) On or about December 22, 1997, granting its employees the benefit of an increased holiday pay bonus, in an effort to thwart the Union's organizational activities.

(b) In January, 1998, increasing the monetary bonus under its attendance policy, in an effort to thwart the Union's organizational activities.

I have also found that Respondent violated Section 8(a)(1) and (3) of the Act by:

1. On or about December 10, 1997, imposing a 7-day suspension on its employee Kathleen Camp.

2. On or about December 16, 1997, imposing a 1-day suspension on its employee Rosanna Torres.

[34] The Representation Petition was filed December 12, 1997. Under the Board's holding in *Ideal Electric Mfg. Co.,* 134 NLRB 1275 (1961), objectionable conduct or unfair labor practices occurring prior to the date of the Petition cannot form the basis for setting aside an election. Such conduct, however, may be considered where it "adds meaning and dimension to related post-petition conduct." *Waste Automation & Waste Management of Pennsylvania,* supra at 376, citing *Dresser Industries,* 242 NLRB 74 (1979). I sustain all Objections which are coextensive with the unfair labor practices I have found Respondent to have committed.

3. On or about December 16, 1997, imposing a 1-day suspension on its employee Yvonne Torres.

4. On or about December 17, 1997, imposing a 1-day suspension on its employee Vanessa Veit.

In addition to sustaining the Objections which parallel the unfair labor practices I have found that Respondent committed, I have found meritorious and sustained the following Objections to the election:

Objection 2. The Employer unlawfully threatened that voting for the union would inevitably result in a loss of flexibility in the workplace.

Objection 12. The Employer unlawfully threatened that voting for the union would inevitably result in employees being forced to strike or lose benefits.

Objection 15 The Employer unlawfully restricted access to the facility .

Objection 17 The Employer unlawfully solicited grievances from employees.

Objection 18 The Employer unlawfully solicited revocations of union representation cards.

In this case the number, nature, severity, and circumstance of the conduct constituting unfair labor practices and objections are more than sufficient to justify setting aside the election. When considered together, their potential effect on the laboratory conditions is indisputable. The unlawful antiunion campaign began almost at the inception of the Union's organizational campaign and continued throughout the day of the election. The nature of the unfair labor practices committed and objections found meritorious includes restrictions on employee solicitations, communications and access; various threats; granting of benefits; solicitation of grievances with the express promise to remedy them; discriminatory discipline; and solicitation of employees to revoke authorization cards and assistance in doing so. Many of them postdated the filing of the Representation Petition and others were continuing. The majority of these violations involve the highest level of management, including the owner of the facility and its administrator. Cumulatively, they affected, in one way or another, the entire bargaining unit. Under these circumstances, the reasonable affect of these unlawful tactics on the election, which was ultimately decided by only two votes, was undoubtedly sufficient to justify setting aside the election as tainted.

CONCLUSIONS OF LAW

1. The Respondent, VJNH, Inc., d/b/a Vestal Nursing Center, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

2. The Union, Local 200A, Service Employees International Union, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following described unit of employees is an appropriate unit:

> All full-time and regular part-time service and maintenance employees, including all certified nursing assistants and floor aides employed at the Employer's Vestal, New York, facility; but excluding the Director of Nursing, Assistant Director of Nursing, case manager, RN Supervisors, head nurses, unit nurses, business office clerical employees, patient care coordinators, clinical coordinators, physical therapists, physical therapist assistants, social workers, music therapists, dietitians, dietary technicians, speech therapists, medical records employees, managerial employees, professional employees, and guards and supervisors as defined in the Act.

4. The Respondent engaged in conduct in violation of Section 8(a)(1) of the Act, and to the extent objected to by the Union, objectionable conduct affecting the election, by:

(a) On or about November 29, 1997, and on other dates in December 1997, at the Vestal facility and in a written communication dated December 2, 1997, by its Administrator Denise Johnson, directing employees, under explicit and implicit threat of discipline, to refrain from discussing the Union or engaging in Union and/or protected concerted activities while at work.

(b) On or about December 9, 1997, in a written communication by Johnson, directing its employees, under explicit and implicit threat of discipline, to inform Respondent of contacts from union supporters and to report the union and/or protected concerted activities of other employees.

(c) (1) On or about December 11, 1997, by its supervisor and agent Cheryl Gonzalez, directing its employees, under explicit and implicit threat of discipline, to refrain from using the second-floor pay telephone, thereby eliminating a benefit or privilege previously enjoyed by employees.

2) On a date in January 1998, removing the second-floor pay telephone, thereby eliminating a benefit or privilege previously enjoyed by employees.[35]

(d) On or about December 16, 17, and 18, 1997, promulgating a policy prohibiting employees from displaying or wearing union buttons, stickers, or insignia, directing its employees to remove union insignia from their uniforms, and in a telephone conversation, informing an employee that the employee would not be permitted to work unless the employee removed union insignia from her uniform.

(e) On or about December 22, 1997, interfering with its employee's Section 7 rights by calling them back from and attempting to prohibit their attendance at a union rally.[36]

(f) (1) On or about December 22, 1997, granting its employees the benefit of an increased holiday pay bonus, in an effort to thwart the Union's organizational activities.

(2) In January 1998, increasing the monetary bonus under its attendance policy, in an effort to thwart the Union's organizational activities.[37]

5. Respondent engaged in conduct in violation of Section 8(a)(1) and (3) of the Act and in conduct objectionable to the conduct of the election by:

(a) On or about December 10, 1997, imposing a 7-day suspension on its employee Kathleen Camp.

(b) On or about December 16, 1997, imposing a 1-day suspension on its employee Rosanna Torres.

(c) On or about December 16, 1997, imposing a 1-day suspension on its employee Yvonne Torres.

(d) On or about December 17, 1997, imposing a 1-day suspension on its employee Vanessa Veit.

6. The Union's Objections, to the extent they are coextensive with the unfair labor practices found to have been committed above are sustained, and in addition, the Union's Objections set forth below are sustained:

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[35] This alleged unfair labor practice is coextensive with the Union's Objection 10.

[36] This alleged unfair labor practice is coextensive with the Union's Objection 5.

[37] The granting of these two benefits is also alleged as objectionable conduct in the Union's Objection 3.

Objection 2. The Employer unlawfully threatened that voting for the union would inevitably result in a loss of flexibility in the workplace.

Objection 12. The Employer unlawfully threatened that voting for the Union would inevitably result in employees being forced to strike or lose benefits.

Objection 15 The Employer unlawfully restricted access to the facility .

Objection 17 The Employer unlawfully solicited grievances from employees.

Objection 18 The Employer unlawfully solicited revocations of union representation cards.

The unfair labor practices committed by Respondent are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily suspended employees Kathleen Camp, Yvonne Torrez, Rosanna Torrez, and Vanessa Veit, it must make them whole for any loss of earnings and other benefits resulting from their suspensions, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspension of Kathleen Camp and notify her in writing that this has been done and that the suspension will not be used against her in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[38]

ORDER

The Respondent, VJHN, Inc., d/b/a Vestal Nursing Center, Vestal, New York, it officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Directing employees, under explicit and implicit threat of discipline, to refrain from discussing the Union or engaging in union and/or protected concerted activities while at work.

(b) Directing its employees, under explicit and implicit threat of discipline, to inform Respondent of contacts from union supporters and to report the union and/or protected concerted activities of other employees.

(c) Eliminating a benefit or privilege previously enjoyed by employees because they engage in union or other protected concerted activities under Section 7 of the Act.

(d) Promulgating a policy prohibiting employees from displaying or wearing union buttons, stickers or insignia, directing its employees to remove union insignia from their uniforms, and informing employees that they would not be permitted to work unless the employees removed union insignia from their uniforms.

(e) Interfering with its employee's Section 7 rights by calling them back from and attempting to prohibit their attendance at a union rally.

(f) Granting its employees the benefit of an increased holiday pay bonus and increasing the monetary bonus under its attendance policy, in an effort to thwart the Union's organizational activities.

(g) Suspending or otherwise disciplining employees because of their support for the Union or because they engage in union or other protected concerted activity under Section 7 of the Act.

(h) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, make Kathleen Camp, Yvonne Torrez, Rosanna Torrez, and Vanessa Veit whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension of Kathleen Camp and within 3 days thereafter, notify her in writing that this has been done and that the suspension will not be used against her in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.[39]

(d) Within 14 days after service by the Region, post at its facility in Vestal, New York copies of the attached notice marked "Appendix."[40] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 11, 1997.

Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election held on March 26, 1998, is hereby set aside, and a new election shall be directed at

[38] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[39] The General Counsel requests on brief a change in the Board's standard language. This is a matter for the Board to address and I defer to their judgment.

[40] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

such time as the Regional Director for Region 3 deems appropriate.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT direct our employees, under explicit and implicit threat of discipline, to refrain from discussing the Union or engaging in union and/or protected concerted activities while at work.

WE WILL NOT direct our employees, under explicit and implicit threat of discipline, to inform us of contacts from union supporters and to report the union and/or protected concerted activities of other employees.

WE WILL NOT eliminate a privilege or benefit previously enjoyed by our employees because they engage in union or other protected concerted activities under Section 7 of the Act

WE WILL NOT promulgate a policy prohibiting employees from displaying or wearing union buttons, stickers, or insignia, direct our employees to remove union insignia from their uniforms, or inform our employees that they will not be allowed to work unless they remove union insignia from their uniforms.

WE WILL NOT interfere with or restrain our employees' exercise of their Section 7 rights by calling them back from and attempting to prohibit their attendance at a union rally.

WE WILL NOT grant our employees the benefit of an increased holiday pay bonus and increase the monetary bonus under our attendance policy in an effort to thwart the Union's organizational efforts.

WE WILL NOT suspend or other wise discipline our employees because of their support for the Union or because they engage in union or protected concerted activity under Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, make Kathleen Camp, Yvonne Torrez, Rosanna Torrez, and Vanessa Veit whole for any loss of earning and other benefits resulting from our discriminatory suspensions of these employees, less any net interim earnings plus interest.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful suspension of Kathleen Camp, and WE WILL, with 3 days thereafter, notify her in writing that this has been done and that the suspension will not be used against her in any way.

VJNH, INC. D/B/A VESTAL NURSING CENTER